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Supreme Court of the United States

OCTOBER TERM, 1935

No. 539

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON and WILLIAM M. GREVE, individually and as trustees in bankruptcy and as trustees in reorganization of ALLIED OWNERS CORPORATION,

Petitioners,

against

RECONSTRUCTION FINANCE CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PERCIVAL E. JACKSON,
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Supreme Court of the United States

OCTOBER TERM, 1935.

No.

IN THE MATTER

of

ALLIED OWNERS CORPORATION,
Bankrupt.

IN THE MATTER

of

ALLIED OWNERS CORPORATION,
Debtor.

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON and WILLIAM M. GREVE, individually and as trustees in bankruptcy and as trustees in reorganization of ALLIED OWNERS CORPORATION,

Petitioners,

against

RECONSTRUCTION FINANCE CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Supreme Court of the United States:

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON and WILLIAM M. GREVE, individually and as trustees in bankruptcy and as

trustees in reorganization of ALLIED OWNERS CORPORATION by Percival E. Jackson, attorney and counsel, pray and each of them prays that a Writ of Certiorari issue to review the decree (R., p. 423) of the United States Circuit Court of Appeals for the Second Circuit made in the above entitled matter on the 29th day of July, 1935, which decree modifies (1) that portion of an order in bankruptcy made by the United States District Court for the Eastern District of New York, entered on March 11, 1935, fixing the compensation of the above named trustees in bankruptcy, (2) that portion of an order in a proceeding under Section 77B of the Bankruptcy Act, made by the District Court, entered on March 11, 1935, directing the payment of the said compensation to the said trustees, and (3) an order of the District Court, entered on May 13, 1935, denying a motion of the Reconstruction Finance Corporation to vacate each of the said orders (R., pp. 307, 311, 386). The decree of the Circuit Court of Appeals modified the orders of the District Court by reducing the compensation of the trustees in bankruptcy from the aggregate amount of $90,000, as fixed by the order of the District Court entered March 11, 1935, to the sum of $14,628.50 for the three trustees, being two per cent. of the sum of $731,425.57 cash turned over by the trustees in bankruptcy (R., pp. 420, 423).

Opinions Below.

The opinions of the District Court are not reported but are printed in the Record (R., pp. 305, 377).

The opinion of the Circuit Court of Appeals is not yet reported but is printed in the Record (R., p. 415).

Jurisdiction.

The decision of the Circuit Court of Appeals was rendered on July 22, 1935, and the order for the mandate thereon was entered on July 29, 1935. The mandate was issued on September 18, 1935.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of Congress of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

Question Presented.

Whether Section 48 of the Bankruptcy Act applies to and determines the compensation for services of trustees in a bankruptcy proceeding when that proceeding is superseded by a proceeding under Section 77B.

This question and point was raised by the Reconstruction Finance Corporation, a creditor of the Debtor, before the Circuit Court of Appeals.

Statement of Facts.

On August 8, 1933, Allied Owners Corporation was adjudicated a bankrupt on its voluntary petition (R., p. 141). On August 25, 1933, Stephen Callaghan and Percival E. Jackson became trustees in bankruptcy, and on September 14, 1933, William M. Greve became a trustee (R., p. 6).

On June 22, 1934, the bankruptcy proceedings were superseded by proceedings for reorganization under Section 77B and the former trustees in bankruptcy were appointed trustees in reorganization (R., p. 3).

Subsequently, an application for allowances for services in the bankruptcy proceeding was filed by the trustees with the Referee in Bankruptcy, and the Referee thereupon gave notice to creditors of a hearing to be held upon said application and other applications, including his own application for services in the bankruptcy matters (R., pp. 264-265). At the hearing before the Referee, the Reconstruction Finance Corporation and other creditors appeared and objected to the proposed allowances as illegal and excessive (R., pp. 287-288).

The Referee thereafter filed his report wherein he recommended allowances to the trustees in bankruptcy in the aggregate sum of $60,000, to be equally apportioned between them (R., p. 300). The Referee in his report expressed the opinion that Section 77B, subdivision (i) gives the Court appointing prior trustees authority to fix a *reasonable* allowance for their services; and that the foregoing amount was a reasonable allowance (R., pp. 293, 303). He stated that if Section 48 of the Bankruptcy Act applied, the maximum commissions for the trustees would be $14,628.50, if based on "cash turned over", or $284,119.92 if based "on money and property turned over" (R., pp. 299-300).

On March 8, 1935, Judge Inch filed a memorandum increasing the aggregate allowance to the trustees from $60,000 to $90,000, and approving the other allowances recommended by the Referee; and on March 11, 1935, an order was entered accordingly (R., pp. 306, 307); and on the same day an order was made by Judge Inch in the reorganization proceeding directing payment of the allowances (R., p. 311).

Upon application of the Reconstruction Finance Corporation that the said orders (and another order fixing the allowances for services of the Referee) be vacated, a hearing was had before Judge Inch, who filed his opinion on May 8, 1935, denying the application of the Reconstruction Finance Corporation (R., p. 377); and on May 13, 1935, an order was made denying the motion (R., p. 386).

In his opinion upon the denial of the motion, Judge Inch said, of reorganization proceedings under Section 77B:

> "The plainly expressed purpose of Congress in affording this new form of relief to distressed debtors, is to avoid the liquidation of its property which usually follows a bankruptcy or an equity suit with Receivership, and giving opportunity for a rehabilitation of the debtor. Unusual and broad powers are reposed in the court for the above purpose. * * *
>
> "Suffice it to say that had the estate been liquidated no such controversy as this in regard to fees could have arisen; but because the trustees in bankruptcy, having in mind the hoped for rehabilitation of the debtor, steadfastly devoted their skill and best efforts to what thereafter turned out to be the solid foundation of the present acceptable plan, they have been exposed to the criticism that they can only be allowed fees based on a liquidation.
>
> "This is contrary to the very purpose of 77-B which removes the temptation of bankruptcy trustees to reduce to cash the estate and assures them of a reasonable allowance even though they have been prevented from liquidating the estate" (R., pp. 380, 382).

Upon appeal of the Reconstruction Finance Corporation from the orders of March 11, 1935, and the order of May 13, 1935, the Circuit Court of Appeals held (in an opinion

by Judge A. N. Hand) that Section 48 (a) and (e) applied and fixed the amounts of the fees which the trustees in bankruptcy could receive; and reduced the allowance to the three trustees to the sum of $14,628.50 (R., pp. 420, 423). In its opinion the Circuit Court of Appeals said:

> *"While we should allow a substantially larger compensation if we were at liberty to disregard Section 48(a)* the amount awarded by the District Court was plainly excessive. The services of the trustees only lasted ten months, were in many respects preliminary to a reorganization and were far less burdensome than those of their counsel. If the reorganization succeeds they will be entitled to substantial compensation in the 77B proceeding." (Italics added.)

The question here presented is solely a question of law; it is not one of the reasonableness or unreasonableness of the particular allowances made to the trustees herein,—if the petitioners are right in their view of the law, the question of what are reasonable amounts may be determined later in the Court below.

Specifications of Error to be Urged.

The Circuit Court of Appeals erred:

1. In holding that when a bankruptcy proceeding is superseded by a reorganization proceeding under Section 77B, the Court which appointed the trustees in bankruptcy is not authorized to fix an allowance for their services as such trustees in an amount which the Court deems reasonable, unaffected by Section 48 of the Bankruptcy Act.

2. In holding that Section 48 fixes the limits within which the Court appointing the trustees in bankruptcy must act in fixing fees for their services as such trustees.

Reasons for Granting the Writ.

1. This case involves an important question of Federal Law of general interest. Section 77B constitutes new legislation of great importance, designed to facilitate the reorganization of corporations which are insolvent or unable to meet their obligations as they accrue. It is particularly important in the case of a corporation in bankruptcy, whether in voluntary or involuntary proceedings, where a plan may nevertheless be successfully worked out for its reorganization and continuance. The question here involved affects all cases where bankruptcy proceedings (in which trustees have been appointed) are superseded by proceedings under Section 77B. It is a question that has never been passed upon by this Court; and it is in the public interest that it should be decided by this Court of last resort.

2. Where the property of a corporation in bankruptcy has been taken over by trustees and the bankruptcy proceeding is subsequently superseded by a proceeding for reorganization under Section 77B, it is the intent of the statute (Section 77B, subdivision (i)) that the trustees should receive *reasonable* compensation for their services in the bankruptcy proceeding to be determined in the first instance by the Court which appointed them. The Court of the prior proceeding is evidently called upon to fix the reasonable compensation for the services rendered therein,

in order that the reorganization court may have the benefit of the experience of the prior court in estimating the fair value thereof; but the reorganization court must also pass upon and determine the reasonableness of the allowances in the light of the additional matters (including the proposed plan of reorganization) before the latter court. (*Matter of New York Investors, Inc.*, Circuit Court of Appeals, 2nd Circuit, July 22, 1935). This is the rule that has been applied in the case of an equity receivership in a Federal Court which has been superseded by a proceeding under Section 77B (*Matter of New York Investors, Inc., supra*). No different principle applies where a prior bankruptcy proceeding is superseded by a 77B proceeding.

3. In all cases (whether in the case of equity receiverships in State or Federal courts, or prior bankruptcy proceedings) it is the intent of the statute that the prior receiver or trustee should receive *reasonable* compensation for his services, fixed first by the Court of his appointment and then checked, as to reasonableness, by the reorganization court. The Circuit Court of Appeals has, however, announced a rule herein which in many cases would defeat the purpose of the statute that reasonable compensation should be allowed the prior receiver or trustee, and which would in many instances result in unnecessary hardship and injustice.

4. It would tend to defeat the purpose of Congress in enacting Section 77B if the rule as to compensation of trustees in prior bankruptcy proceedings were as announced by the Circuit Court of Appeals herein. The evident purpose of the statute is *to avoid liquidation;* yet if trustees in the prior bankruptcy proceeding are to be compensated

by commissions upon the amount of money turned over by them, there is a strong incentive to liquidation by transforming the property into money. It was, doubtless, to prevent such a situation that it was provided that the trustees should receive such reasonable compensation as the prior court should fix, to be subsequently checked as to reasonableness by the reorganization court. Trustees in bankruptcy who, having in view the possible successful rehabilitation of the corporation in a subsequent reorganization proceeding under Section 77B, apply themselves and devote their efforts to conserving, so far as possible, the properties and organization of the bankrupt and to avoiding liquidation, would, in many cases, find their efforts rewarded with altogether inadequate compensation, which might have been many times larger had they vigorously promoted the liquidation of the assets. The decision of the Circuit Court of Appeals sought to be reviewed herein thus tends to defeat the purpose of the new legislation. It is greatly in the public interest that the decision should be reviewed by this Court.

5. Under the decision of the Circuit Court of Appeals herein it would be possible for trustees in bankruptcy to act as such over a considerable period of time and perform services of great value to the corporation, and yet receive nothing, or substantially nothing, for their services. That no such inequitable result was contemplated by Congress appears from the language of Section 77B, subdivision (i), wherein it is expressly provided that the Judge in the reorganization proceeding shall make such orders "as he may deem *equitable*" for the payment of such reasonable allowances in the prior proceeding as may be fixed by the Court

appointing the prior trustees. Again, in the same subdivision, it is provided that where a proceeding under Section 77B is dismissed and the debtor's property returned to the prior receiver or trustee, it shall be upon such terms "as the judge may deem equitable," for the protection of obligations incurred by any trustee or trustees appointed in the proceeding and for the payment of allowances therein. The repeating of the word "equitable" in subdivision (i) indicates the intent of Congress that in either case therein provided for the trustees shall receive for their services the reasonable compensation to which they are equitably entitled.

WHEREFORE, your petitioners respectfully request that a writ of certiorari should be granted as prayed.

Dated: New York City, N. Y., October 22, 1935.

STEPHEN CALLAGHAN,
PERCIVAL E. JACKSON,
WILLIAM M. GREVE,
Petitioners.

PERCIVAL E. JACKSON,
Attorney and Counsel for
Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Reference to the opinions of the Courts below, and the grounds of jurisdiction, as well as a statement of the case and the specifications of error to be urged, are contained in the petition.

Summary of Argument.

I.

Section 48 of the Bankruptcy Act is not applicable and does not limit the compensation of Trustees in Bankruptcy where the bankruptcy proceeding has been superseded by a proceeding under Section 77B.

Section 48 has no application where the bankruptcy proceeding does not proceed to its normal termination in liquidation or composition, but is summarily cut off and left incomplete by the intervention of a proceeding under Section 77B.

The attempt to apply Section 48 to a bankruptcy proceeding superseded by a proceeding under Section 77B leads unnecessarily to inequitable, unjust and unreasonable results not contemplated by Congress in the enactment of the later statute.

ARGUMENT.

I.

Section 48 of the Bankruptcy Act is not applicable and does not limit the compensation of trustees in bankruptcy where the bankruptcy proceeding has been superseded by a proceeding under Section 77B.

The Court below held that, while the allowances to the trustees herein under Section 48 were inadequate, and it would have allowed compensation in a substantially larger sum if it were at liberty to disregard Section 48, yet the limitations fixed by that section prevented the award of any larger amount. It is submitted that in this the Court was in error; and that Section 48 is inapplicable and is not controlling where a prior bankruptcy proceeding is superseded by a reorganization proceeding under Section 77B.

Section 48, subdivision (a), provides that "trustees shall receive for their services, payable after they are rendered, * * * such commissions on all moneys disbursed or turned over to any person, including lienholders, by them, as may be allowed by the courts, not to exceed" the percentages therein set forth. Subdivision (e) provides for larger commissions where the trustees conduct the business. Under the preceding section (Section 47) it is the duty of trustees to "collect and reduce to money the property of the estates for which they are trustees" and to close up the estates as expeditiously as compatible with the interests of the parties. Upon completion of the liquidation (which is the primary function and purpose of the ordinary bankruptcy proceeding) and the administration of the estate,

the trustees are to receive the commissions set forth in Section 48 "on all moneys disbursed or turned over to any person, including lienholders, by them." In case of the confirmation of a composition, Section 48 further provides, the Court may allow the trustee, as compensation, "not to exceed one-half of one percentum of the amount to be paid to the creditors on such composition."

Section 48 says that trustees are to receive for their services, "payable after they are rendered," the compensation therein provided; and there can be no doubt that Section 48 was intended to apply, primarily, to completed administrations. The section, in its original form, and as amended in 1903, specifically provided that trustees were to receive "from estates which they have administered" commissions allowed by the courts. It has been said of Section 48, in its present form, that "no compensation is payable [to trustees] until after the services are rendered, *i. e.*, when the administration is closed" (Collier on Bankruptcy, 13th ed., p. 1074).

Section 48, subdivision (a), contains no provision for commissions to trustees where property is turned over by them in kind. In this respect it differs from subdivision (d) of the same section, as to receivers, wherein it is expressly provided that receivers are entitled to commissions on moneys "afterwards realized by the trustees from property turned over in kind by them to the trustees". The evident reason for this difference is that it is the duty of the trustees to liquidate the estate, convert the properties into money, and to disburse or turn over the moneys; and they are to receive commissions, under Section 48, on the moneys so disbursed or turned over; whereas, in the case of receivers, who are temporarily in possession, it is

expected that the property turned over by them to trustees will be largely in kind, as to which a special provision for commissions to receivers is accordingly made in subdivision (d).

Nothing in the provisions of Section 48 as to commissions to trustees, therefore, meets the situation which arises when the bankruptcy proceeding is abruptly cut off and terminated upon the filing and approval of a petition or answer for a corporate reorganization under Section 77B. The latter section provides in subdivision (i) that "if a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial court, whether before or after this amendatory act takes effect, a petition or answer may be filed at any time thereafter by the corporation or its creditors as provided in subdivision (a) of this section, and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property."

Thus, if after trustees in bankruptcy have been acting as such for perhaps a considerable period of time, and have become entitled to and taken possession of property of the bankrupt in great amount and value which, however, they have not yet reduced to cash, and while they have substantially no moneys of the bankrupt, a petition or answer for reorganization under Section 77B is filed and approved, the bankruptcy trustees would be required to turn over the property in kind to the trustees in reorganization, or to the debtor himself if no trustees were appointed; and the bankruptcy trustees would (under the provisions of Section 48) receive substantially no compensation for their

services however faithful and valuable to the estate those services may have been.

This situation arises for the reason that while Section 48 provides, as above pointed out, for trustees' commissions in ordinary bankruptcy proceedings (terminating, as they would, in liquidation and distribution, or composition), it was not intended to cover or apply to the new and altogether different proceeding (unknown and unthought of at the time Section 48 was enacted) created by Section 77B.

Section 77B introduced a new element in bankruptcy legislation. Though Section 77B forms part of the Bankruptcy Act, the proceeding for corporate reorganization therein provided for is not, strictly speaking, a bankruptcy proceeding. Through this section (as well, also, as Sections 74, 75, 77 and 80) the Bankruptcy Act is designed to be used as a vehicle for the *"relief of debtors"* (Section 77A), as distinguished from the "liquidation of estates," which was the primary function and purpose of the earlier strict bankruptcy provisions, of which Section 48 forms a part. A clearly drawn distinction exists between those who are adjudicated bankrupts in the ordinary bankruptcy proceedings and debtors who seek relief in proceedings under Section 77B; the section itself, in subdivision (a), specifically provides that the corporation for whose relief the proceeding is brought shall be referred to therein as a "debtor" and not as a "bankrupt."

As was said by Judge Inch in his opinion herein, "the plainly expressed purpose of Congress in affording this new form of relief to distressed debtors, is *to avoid the liquidation* of its property which usually follows a bankruptcy or an equity suit with receivership, and give oppor-

tunity for a rehabilitation of the debtor" (R., p. 380). In *Campbell* v. *Alleghany Corp.*, 75 Fed. (2d) 947, 951 (C. C. A. 4th Ct.), it is said of Section 77B: "Only by the further exercise of the bankruptcy power of Congress could adequate relief be afforded to these distressed debtor corporations and their creditors; and the act in question was passed for the purpose of affording this relief."

Because there was no provision in the previously enacted sections of the Bankruptcy Act (having to do with ordinary bankruptcy proceedings) for the compensation of the trustees in bankruptcy, who are required by this new Section 77B to turn over the property (perhaps for the most part in kind) to the trustees in the reorganization proceeding, a provision for such compensation is found in a further provision of subdivision (i) of Section 77B, as follows: "and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee."

If it were not for this provision of Section 77B, the sole power to fix the allowances of receivers or trustees appointed in prior proceedings would apparently be in the Judge in the reorganization proceeding, the entire property of the debtor corporation having come under his supervision and control (*Gross* v. *Irving Trust Co.*, 289 U. S. 342). The clearly stated purpose of Section 77B, however, is to have the Court in the prior proceeding (being more familiar with the services therein rendered) fix allowances, in such amounts the Court deems reasonable, for the receiver or trustees appointed therein. It is then for

the Judge in the reorganization proceeding to make such orders "as he may deem equitable" for the payment of such "reasonable" allowances as have been fixed by the Court appointing the receiver or prior trustees. Therefore, in the case of prior trustees in bankruptcy, the Bankruptcy Court is first to determine the reasonable amounts to be allowed for their services; but the amounts so allowed must also be reviewed, as to their reasonableness, by the Judge before whom the reorganization proceeding is pending, in the light of the new matters, including the plan of reorganization, pending before him. Thus, the amounts fixed by the Bankruptcy Court as reasonable in view of the services performed might be found by the Judge in the reorganization proceeding to be such that their payment would endanger the success of the plan of reorganization; and he might, therefore, make such an order as he deemed equitable for the payment of amounts found by him to be reasonable.

A correct statement of the rule as to allowances under Section 77B (i) to receivers and trustees in prior proceedings is that suggested in *In re 211 East Delaware Place Bldg. Corp.*, 7 F. Supp. 892, 896 (D. C., Ill.), wherein it is said:

> "It seems to have been intended by Congress that prior receivers and other parties having claims for compensation for administrative services should present their application for fixing such reasonable compensation to the court under whose jurisdiction they were appointed. The proper procedure apparently is for that court to enter an order adjudicating such claims, said action to be followed by the action of the bankruptcy [77B] court in directing the payment of such of the same as shall be found to be reasonable."

This was the view taken by the Court below, of the procedure to be followed under Section 77B (i), in *Matter of New York Investors, Inc.* (Circuit Court of Appeals, 2nd Circuit, decided July 22, 1935), wherein (an equity receivership in a Federal court having been superseded by a reorganization proceeding) it was said: "These provisions [subdivision (i)] were inserted in the act to give the reorganization court the benefit of the experience of the prior court in estimating the fair value of the services."

Though the Court below has adopted the view above expressed in the case of equity receiverships superseded by reorganization proceedings, it has, in the present case, as to a prior bankruptcy proceeding superseded by a reorganization proceeding, placed a different construction on Section 77B (i), which has resulted (as the Court below said) in inadequate compensation to the trustees herein, and which, in other cases, might readily give to trustees in bankruptcy no compensation whatever. The Court adopted this construction because, as it said, it felt constrained to do so by the limitations found in Section 48 of the Bankruptcy Act. The Court below was in error in this respect for the reason, as above pointed out, that there is nothing in Section 48 that applies to or covers the situation created where a bankruptcy proceeding is abruptly interrupted and summarily ended by a subsequent reorganization proceeding.

It is not the contention of the petitioners herein, as the Court below seemed to think, that Section 77B (i) does away with or in any way affects the restrictions or limitations found in Section 48. That section now limits, as before, the allowances in the ordinary or strict bankruptcy proceedings, unaffected by anything in Section 77B (i); while the latter section provides for *reasonable allowances*

to be made in the prior proceedings in cases within the new legislation, to which Section 48 should be held to be inapplicable. The two sections are not inconsistent; each applies to and is controlling in its own field.

The limited construction placed upon Section 77B (i) by the Court below defeats the evident purpose of Congress that *in all cases* (not merely in equity receiverships and in a limited number of prior bankruptcy proceedings) the receiver or trustees appointed in prior proceedings should have *reasonable compensation*,—reasonable (1) with respect to the services rendered, and (2) with respect to their effect upon the reorganization,—and therefore to be passed upon by the judges in both proceedings. The limited construction adopted below leads to inequitable, unjust and unreasonable results. That it was the purpose of Congress that *equitable* provision should be made for the payment of *reasonable compensation* appears from the emphasis placed upon the word "equitable" in subdivision (i) wherein it appears twice in connection with the making of reasonable payments.

A statute should receive a reasonable construction, so as to give effect to the object of the legislature, and if the meaning is doubtful such a construction, if possible, as will not lead to unreasonable results (*People ex rel. Hallock* v. *Hennessy*, 205 N. Y. 301). In construing the provisions of the Bankruptcy Act this Court has said, "We should therefore construe the language of the act so as to effectuate the evident purpose of the legislation, and not so narrowly as to defeat the true intent of Congress." (*Royal Indemnity Co.* v. *American Bond & Mtge. Co.*, 289 U. S. 165, 169.)

When a prior bankruptcy proceeding has been superseded by a reorganization proceeding under Section 77B,

the prior proceeding has abruptly terminated. Nothing remains therein except to fix the reasonable allowances. Where the trustees in bankruptcy have worked hard and faithfully having in mind the possibility of the successful rehabilitation of the debtor corporation, and to that end have devoted their efforts to conserving the corporate property and organization (and not to liquidating the assets, with a view to increasing their commissions) they may have on hand, when the bankruptcy proceeding is interrupted, substantially no cash; and in such case they would receive no compensation for their services, however extended, arduous and faithful they may have been. Such a result, which puts a premium on liquidation, was never contemplated when Section 77B was enacted. The view adopted by the Court below further operates to defeat the purpose of Congress in that it would make it increasingly difficult to procure men of ability and high standing to act as bankruptcy trustees if there were no assurance that they would receive reasonable compensation for their services in the bankruptcy proceedings.

The Court below says in its opinion that it was never intended that the determination of the prior court upon allowances should be conclusive upon the judge in the reorganization proceeding (R., p. 418). This is in accord with the position of the petitioners herein,—the prior court is to fix such allowances for the services as it deems reasonable, and the judge in the reorganization proceeding must review them, in the light of the additional matters before him (including the proposed plan or reorganization), and make an "equitable" order for the payment of "reasonable" allowances.

The Court below suggests that if the parties whose compensation is fixed by the prior court feel aggrieved by the allowances as inadequate, "they would seem to have an obvious remedy by appeal" (R., p. 418). But if the construction placed upon the statute by the Court below is correct, and if trustees (who have rendered extended and valuable services) are allowed only nominal compensation, or nothing at all, because there is substantially no cash (by reason of the limitations contained in Section 48 which the Court has held applicable) then an appeal would be futile; because the appellate court would be subject to the same *statutory limitations*, and could make no additional allowance.

It is also suggested in the present case that, although the allowance made to the trustees is admittedly inadequate, yet as they are also the trustees in the reorganization proceeding, where they will be entitled to substantial compensation, the failure to allow them reasonable and adequate compensation for their services as prior bankruptcy trustees, may in this way in some measure be made up to them (R., p. 420). But it was evidently not the purpose of Congress that the failure to allow trustees reasonable compensation in one proceeding, should be made up to them by proportionately increasing the allowances in, and the burden thus imposed upon, another proceeding. Each proceeding must stand by itself. Moreover, the trustees in the reorganization proceeding may be different persons from the trustees in the prior proceeding; or no trustee at all may be appointed in the reorganization proceeding in which case the statute requires the property to be turned over to the debtor itself.

It is said, in the opinion below, that it was the purpose of Congress to lessen the cost of insolvency proceedings which had long been regarded as too great; and this is undoubtedly so. This is, however, accomplished by the construction placed upon Section 77B, subdivision (i) by the petitioners herein. The statute affords a double check upon the reasonableness of the allowances,—the prior court is first to fix them in such amounts as it deems reasonable, and the judge in the reorganization proceeding is also to pass upon and determine that they are reasonable. These determinations may be further reviewed upon appeal, and modified if the appellate court believes them unreasonably large (*Matter of New York Investors, Inc., supra*). Thus the construction of the statute, for which petitioners contend, facilitates, rather than impedes the economical administration of the debtor's estate and the successful reorganization of the debtor corporation.

The fact should not be lost sight of that it is not now a question of the amounts of the particular allowances in the present case. If they are deemed too large they may be modified by the Court below to such amounts as it may deem reasonable. The question is solely one of law, as to whether the Courts are prevented from allowing reasonable compensation for the services of prior bankruptcy trustees by reason of limitations found in Section 48, which the petitioners believe to be inapplicable.

That Section 48 does not apply to or limit the reasonable allowances to trustees in "proceedings instituted" under Section 77B, is expresaly provided in subdivision (k) thereof, which provides that where in a proceeding instituted under Section 77B an order for liquidation is made, Section 48 applies, but as to all other proceedings under Section 77B

not terminating in liquidation, Section 48 has no application. The express provision of subdivision (k) that Section 48 applies only in said proceedings resulting in liquidation, gives additional support to the view of the petitioners herein that the limitation of trustees' commissions found in Section 48 applies and was intended to apply *only where there is a liquidation*. It may be said, moreover (and this point was also raised by petitioners in the Court below) that Section 77B, subdivision (k), in providing that "none of the sections enumerated in this subdivision (k) [including Section 48] shall apply to proceedings instituted under this section 77B unless and until an order has been entered directing the trustee or trustees to liquidate the estate", was intended to include and to incorporate into the reorganization proceeding under Section 77B the prior proceeding (in which a receiver or trustees had been appointed and which had been superseded by the 77B proceeding) to the extent of excluding the operation of Section 48 therefrom; so that the sole provision of the Bankruptcy Act for the compensation of trustees in a prior bankruptcy proceeding superseded by a proceeding under Section 77B should be that provided in subdivision (i) thereof, above quoted, namely, such reasonable allowance as the court of prior appointment should fix, subsequently approved by the judge in the reorganization proceeding. This construction of subdivision (k) (which was not adopted by the Court below) would give effect to what petitioners believe was its real purpose, that is, to afford to receivers and trustees in all prior proceedings, of whatever nature, whether in State or Federal courts, when superseded by proceedings under Section 77B, reasonable compensation for their services in such prior proceedings.

The decision of the Court below has deprived the petitioners of the reasonable compensation for their services in the prior bankruptcy proceeding which, under Section 77B, it was intended they should have.

Conclusion.

It is respectfully submitted that the construction placed upon Section 77B (i) by the Circuit Court of Appeals to the effect that the power to make reasonable allowances for services of trustees in prior bankruptcy proceedings when superseded by reorganization proceedings under Section 77B, is subject to the limitations found in Section 48, is erroneous; and its decision should be reviewed by this Court.

In view of the importance of this question in reorganization proceedings under Section 77B, it is earnestly hoped that the petition will be granted.

The petition for a Writ of Certiorari should be granted.

Dated: New York City, N. Y., October 22, 1935.

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